C. J. P. R./1-91

Cr. No. 893/96 (2)

# APPEAL OF PRISONER

Division Bench (Criminal)

CF0000060928

878

Name विहारीलाल निषाद

Father's name नरसिंह निषाद

Residence पाला, थाना लमनार, जिला रायगढ़ (म. प्र.)

Sentenced to आजीवन कारावास

Under Section 302 भा.द.सं. द्वितीय अति. सत्र न्या. रायगढ़

It is explained to the prisoner that if he states he wishes to be represented by a legal practitioner the appellate Court will not proceed with the case for seven days unless the legal practitioner appears earlier. If the legal practitioner does not appear within seven days he may not heard at all. if the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement

2 Date on which copy received

3 Date on which Appeal sent

4 Whether the prisoner wishes to be represented or not.

Name विहारीलाल

Confined in जिला Jail रायगढ़

No. 808 Dated 31/3/96 199

Forwarded to the

together with a copy of judgement or order passed in the case for favour of transmission to the proper Appellate court.

संलग्न :- निर्णय प्रतिलिपि।

Certified to be a true copy of the order dated 15 MAY 96 passed by this Court in Criminal Appeal No. 123

Assistant Registrar
High Court of Madhya Pradesh
JABALPUR

अधीक्षक
जिला जेल रायगढ़ (म.प्र.)

Date of receipt in Office

Date of receipt of record to accompany the

Memo of Appeal to the Appellate court

No. A/C/1001 Dated 17-4-96 199

Forwarded to the

Date of receipt in Appellate court

[ P.T.O. ]

HC-22

(40) (41)

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**आदेश पत्रक**

**मामला क्रमांक** G.A. 893/96 **सन्** ~~200~~

..... **विरुद्ध** .....

| आदेश का दिनांक आदेश क्रमांक सहित | आदेश हस्ताक्षर सहित | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश |
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DIVISION BENCH: -
HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. DILIP R. DESHMUKH, JJ.

21-6-2005

Mr. Abhay Tiwari, counsel for the appellant.

Mr. U.N.S. Deo, Govt. Advocate/Public Prosecutor for the State/respondent.

Oral.

The accused/appellant has preferred this appeal under Section 374 (2) of the Cr.P.C. being aggrieved by the judgment of conviction and sentence dated 20th March, 1996, passed by the 2nd Additional Sessions Judge, Raigarh, whereby learned 2nd Additional Sessions Judge after holding the accused/appellant guilty for the commission of offence under Section 302 of the I.P.C., sentenced him to undergo imprisonment for life.

Briefly stated prosecution case is that on 14-2-1995 at about 10 a.m. when the accused/appellant along with his wife were returning after threshing their paddy by the hauler mill of Duryodhan (PW-4), the accused/appellant asked his wife (deceased Rania Bai) to advise his father to go back and after some time both of them will go to her father's place. Deceased Rania Bai refused to accede to the request of her husband (accused/appellant) and told him that she will also go along with his father and thereafter, she will not return to his house.

(44) (42)

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..... **विरुद्ध** .....

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On hearing this from Rania Bai, the accused/appellant being enraged picked up a stone lying nearby and attacked his wife with the stone on her head, face and temporal region, she received fatal injuries as a result of which she died instantaneously. The matter was reported by the accused/appellant himself on the same day at about 5 p.m. at Police Station: Tamnar. PW-10 A.S. Gyani on receiving the report Ex.P-9 registered the case under Ex.P-10 and left for the spot. He prepared the site plan Ex.P-11 and after giving notice to the Panchas prepared Panchanama of the dead body Ex.P-2. He also got prepared the map (Ex.P-12) from the Halka Patwari.

The dead body of Rania Bai was sent for post-mortem examination to Primary Health Centre, Tamnar, where Dr. B.R. Banjare (PW-11) conducted post-mortem on the body of Rania Bai. The doctor noticed as many as seven injuries out of which six injuries were lacerated wounds on head & face, and there was one bruise. The injuries were vertical in nature deep up to the bone. There was one lacerated wound of size 2" x 1" on the left side of the face extending to left temporal part of the head. Left temporal bone, maxilla bone and bone near the left eye were found fractured and clotted blood was present. The second lacerated wound was of size 2" x 0.6" on the left side of the face near injury No.1. Similar lacerated wound of size 2" x 0.5" was near injury No.1 on the left side of the face. There was another lacerated wound of size 2" x 0.5" on the left temporal region.

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There was also another lacerated wound of size 4" x 1" in the middle of the head. Another lacerated wound was of size 1" x 0.4" on the right side of head. The left eye was damaged. All the injuries were anti-mortem in nature and were caused by hard and blunt object. In the opinion of the Doctor, injuries No.1, 2 & 3 were dangerous to life and the nature of death was homicidal. After conducting post-mortem, the doctor prepared post-mortem report Ex.P-19. The stone was sent for opinion of the doctor and the doctor opined that injuries on the head of the deceased can be caused by the stone in question. He gave his report Ex.P-20. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, who committed the case to the Sessions Judge, Raigarh for trial, from where, the learned 2nd Additional Sessions Judge received the case on transfer.

After hearing the Additional Public Prosecutor and counsel for the accused, and after perusal of the papers, the learned 2nd Additional Sessions Judge was of the opinion that prima facie, offence under Section 302 of the I.P.C. was made out against the accused/appellant. Therefore, he framed charge for the said offence, read over and explained to the accused, who in turn denied the charge.

The prosecution in order to prove the offence against the accused/appellant examined as many as 11 witnesses. The learned Additional Sessions Judge also recorded the statement of the

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accused under Section 313 of the Cr.P.C. in which the accused/appellant simply denied the prosecution case, and in the end, he stated that he is innocent, he has not committed the murder of his wife. However, the learned Additional Sessions Judge after hearing the arguments of counsel for the accused and the Additional Public Prosecutor, and perusal of the evidence held the accused guilty for the commission of offence under Section 302 of the I.P.C. and sentenced him in the manner mentioned above.

We have heard learned counsel for the appellant and learned Public Prosecutor on behalf of the State/respondent.

At the outset, learned counsel for the appellant submitted that he is not challenging the finding of the trial Court on merit. However, he submitted that on the facts and in the circumstances of the case, the trial Court's finding regarding conviction of the accused under Section 302 of the I.P.C. is legally not sustainable as from the evidence available on record offence under Section 304 Part-II of the I.P.C. was made out. On refusal of the request made by the accused/appellant, by the deceased and on saying that she will go to her parent's house along with his father and she will never return, that enraged the accused/appellant and in heat of passion, the appellant picked up the stone lying nearby the site of occurrence and assaulted his wife, as a result of which she received fatal injury and died spontaneously.

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On the other hand, learned Public Prosecutor while supporting the finding of the trial Court argued that the manner in which the offence took place, looking to the weapon of offence and the nature of injuries, the finding of the trial Court is based on legal evidence, as such the appeal should be dismissed.

As far as the nature of death of the deceased being concerned as homicidal, from the evidence of PW-11 Dr. B.R. Banjare it stands proved that the death of Rania Bai was homicidal in nature.

Now, coming to the involvement of the accused in crime, the case rests on the circumstantial evidence i.e. last seen. The deceased was last seen with the accused. In this connection, PW-4 Duryodhan, the owner of hauler mill, has stated that the accused/appellant came to his hauler mill with paddy on the fateful day with a lady and one Gunanidhi was also with them, thereafter, the paddy of Gunanidhi was threshed and the hauler mill was closed. Thereafter, he heard some voice that one body of a lady is lying, on hearing this he went to the site where he saw that the body of the lady who came to the hauler mill with the accused was lying and there were injuries on the face of that body. That lady came for the first time to his hauler mill. PW-5 Gunanidhi has stated that he knows accused/appellant Bihari and on the fateful day he saw his wife also and before that he had not seen her. On the fateful day, he went to the hauler mill for the purpose of getting his paddy threshed. Accused Bihari and his wife also came for

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the same purpose and after getting their paddy threshed they left the hauler mill. On hearing the voice, he along with Duryodhan went towards the scene of occurrence and saw the dead body of the lady who came with Bihari. In the cross-examination, this witness has categorically stated that Bihari, the accused/appellant and that lady left together.

In view of the above evidence, the time gap between the deceased lady was seen with the accused/appellant and the crime in question i.e. the body of Rania Bai was found, was so small that only and only irresistible inference can be drawn that the author of the crime was the accused/appellant and none else. We are fortified for our opinion by the judgment of the Hon'ble Apex Court in the matter of **BODHRAJ ALIAS BODHA AND OTHERS V. STATE OF JAMMU AND KASHMIR** reported in **(2002) 8 SCC 45**, in which it has been held that:

> "the theory of last seen comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

The Hon'ble Apex Court further held that:

> "It would be hazardous to come to a conclusion of guilt in cases where there is no other positive

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evidence to conclude that the accused and the deceased were last seen together."

Apart from that, the stone with which Rania Bai was assaulted was also recovered from the spot by the Investigating Officer, and the doctor PW-11 examined that stone and opined that it was possible to cause injuries which were found on the body of Rania Bai, with that stone. As per the Serologist's report Ex.P-18, human blood was found on the lungi of the accused, blouse & broken bangles of the deceased, and as per the evidence of the I.O., the said lungi was taken into possession from the custody of the accused. Therefore, on the basis of the above evidence, we are of the considered opinion that finding of the trial Court holding the accused/appellant as the author of the crime is based on legal evidence and we do not find any reason to interfere with that finding.

Now, coming to the question as to whether offence under Section 302 of the I.P.C. was committed by the accused on the facts and circumstances of the case, in this connection, we are of the view that the following judgments of the Hon'ble Apex Court are relevant on the point.

The prosecution case in the matter of **Mahesh vs. State of Madhya Pradesh** reported in **1996 (6) Supreme Cases 609** was that the deceased objected to the appellant not let his cattle damage the crop. The appellant, however, did not pay any heed to the request of

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the deceased and insisted that he would graze the cattle in that field and altercation ensued between the deceased and the accused. In that process the appellant dealt a pharsa blow on the head of the deceased Krishna Kumar as a result of which he died on the spot. On these facts Hon'ble Apex Court held that in these circumstances, the accused during a sudden quarrel without any premeditation assaulted the deceased therefore the offence will fall within Exception-4 to Section 300 of the I.P.C. therefore the accused was held guilty under Section 304 Part I of the I.P.C.

Similarly, facts of the case in the matter of **State of Rajasthan vs. Satyanarayan** reported in **1998 (1) Supreme 433** were that accused Satyanarayan was neighbour of Bhima. Some quarrel took place between Bhoridevi, wife of Bhima and the accused and there was exchange of words between her and accused Satyanarayan. In that process the accused assaulted Bhoridevi with an iron pipe. He also injured Ram Gopal and then went back to his house. By that time Kesar Lal (deceased), brother of Bhima, went near the house of accused and started questioning the accused as to why he was quarrelling like that in the morning. Thereupon the accused came out of his house with a knife and inflicted a blow on the abdomen of Kesar Lal as a result of which his intestines came out and he died. The accused ran away from that place. On these facts, the Hon'ble Apex Court held that the respondent had not aimed the blow on any

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vital part of Ram Gopal or Kesar Lal. The blow was aimed at Ram Gopal but as he moved aside, it landed on the stomach of Kesar Lal. Therefore, the Court held that the appellant should have been convicted under Section 304 Part-I of the I.P.C. and not under Section 302.

Similarly, in the matter of Gend Lal vs. State of M.P. reported in 2003 (1) M.P.L.J. 46, the M.P. High Court has held that

> "Accused during an altercation with wife dealt some blows on her with two feet bamboo-stick and on account of excessive bleeding she died - No reason or motive for independent witness to have falsely implicated accused - However there was no indication that accused who got enraged on account of some remarks of deceased during altercation and picked up stick had any prior ill-will and intention to cause her death - His proved act would not therefore amount to the offence of 'murder' - Liable to be convicted under section 304 (II) and sentenced to rigorous imprisonment for 10 years."

In the light of the above judgments, if we look into the facts of the present case, as per the prosecution case on 10-2-1995, father of deceased Rania Bai - Budluram came to the place of the accused/appellant in order to take Rania Bai to his place to show her Mela. On the fateful day when the accused/ appellant and his wife (deceased Rania Bai) were returning from the hauler mill after getting their paddy threshed, the accused/appellant requested the deceased

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to advise his father to go back and they will go to his place together after some time, on which deceased Rania Bai refused to accede his request and said that she will go along with his father, thereafter, she will never return to his place, it seems this reply and attitude of the deceased enraged the accused/appellant who immediately picked up a stone lying nearby and in the heat of passion without any pre-plan, preparation or pre-meditation assaulted Rania Bai with that stone.

Therefore, in our considered opinion, the case is squarely covered under Exception-4 to Section 300 of the I.P.C. and this falls under the category of culpable homicide not amounting to murder. In the circumstances, we are of the opinion that offence under Section 304 Part-II of the I.P.C. was made out against the accused/appellant for which 10 years rigorous imprisonment is sufficient to meet the ends of justice.

In the result, the appeal is partly allowed. The accused/appellant is acquitted of the offence under Section 302 of the I.P.C., instead thereof, the offence is converted into Section 304 Part-II of the I.P.C. and he is convicted under this offence. The accused/appellant is sentenced to undergo 10 years R.I. The accused/appellant is entitled for set off for the period for which he remained in Police and judicial custody during the investigation and trial.

**Sd/-**
**L.C.BHADOO**
**Judge**

**Sd/-**
**Dilip Raosaheb Deshmukh**
**Judge**

(पीठ देखिये)

Soma

20.7.05